

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Mikell R. Scarborough, Master-in-Equity

Case No. 2017-001205

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OCT 13 2017

SC Court of Appeals

Triad Mechanical Contractors, Inc., Respondent,

v.

Built Right Construction, LLC; Austin-HITT Contracting, a Corporation; Allison Smith Company, LLC; Charleston County Aviation Authority, A Body Politic; Jesse L. Blewer; Christopher Pelletier; Gene Pelletier; Federal Insurance Company/Travelers Casualty and Surety/Liberty Mutual Company; Defendants,

of which,

Built Right Construction, LLC, Chris Pelletier, and Jesse Blewer are Appellants.

INITIAL BRIEF OF APPELLANT

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October 7, 2017

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STATEMENT OF THE ISSUE ON APPEAL

DID THE MASTER-IN-EQUITY ERR IN FAILING TO GRANT APPELLANTS' REQUEST FOR A JURY TRIAL BY FINDING THAT THEY WAIVED THEIR RIGHT TO A TRIAL BY A JURY?

STATEMENT OF THE CASE

Triad commenced this the action by filing a summons and complaint on December 9, 2014. The summons and complaint named the following defendants: Built Right Construction, LLC; Austin-HITT Contracting, a Corporation; Allison Smith Company, LLC, Charleston County Aviation Authority, A Body Politic; Jesse L. Blewer; Christopher Pelletier; Gene Pelletier; Federal Insurance Company/Travelers Casualty and Surety/Liberty Mutual Company. Defendant Gene Pelletier unfortunately passed away on October 5, 2016. Appellant Christopher Pelletier is the sole owner of Built Right Construction, LLC, and distinguishing between the two serves no purpose useful to this Appeal. Thus, Appellants Christopher Pelletier and Built Right Construction, LLC shall be collectively referred to as "Pelletier" throughout this Brief.

Triad's claims included, verbatim: (1) Action on payment Bond pursuant to S.C. Code §11-35-3030; (2) Breach of Contract as to Built Right; (3) Quantum Meruit; (4) Interest SC Code 29-6-50; (5) Attorney Fees SC Code 27-1-15; (6) Civil Conspiracy as to Defendants "Built Right", Jesse L. Blewer, Christopher Pelletier and Gene Pelletier; and (7) Conversion as to Defendants "Built Right", Jesse L. Blewer, Christopher Pelletier and Gene Pelletier.

Appellant Pelletier had Larry Richter and Aaron Edwards of the Richter Law Firm, LLC ("Richter Law") on non-refundable retainer for matters related to this action dispute approximately 9 months prior to it's commencement. Under Richter Law's counsel, Pelletier entered and Answer and Counterclaim on August 26, 2017 that denied the vast majority of Triad's allegations including all claims for relief, asserted various affirmative defenses, and set fourth two counterclaims: (1)

Breach of Contract and (2) Wrongful Appropriation of Personality. (See Answer and Counterclaims of Built Right Construction, LLC and Christopher Pelletier).

The matter was referred to the Master-in-Equity on July 26, 2016. (See Order of July 26, 2016.) The exact sequence of events that led to the reference are unclear on the record as the Order of July 26, 2016 was a Form 4 Order containing a “Statement of Judgment by the Court: By consent of the parties, and pursuant to Rule 53, this court hereby refers this case to the equity division of the court for final disposition. The Master-In-Equity shall enter final judgment with any appeals to be taken in accordance with 14-11-85. The reference fee shall be paid directly to the office of the Master-In-Equity; upon a failure to do so, the Master shall order the case to be dismissed without prejudice for failure to comply with the court's order.” (Order of July 26, 2016, p. 1.) This Order, however, is a bit mysterious given that the docket shows no hearing to have taken place, and, as will explained more fully below, Richter Law failed to convey any information whatsoever related to the Reference to Appellant Pelletier, and so Pelletier is wholly unable to shed any light on the situation. The other reason the exact sequence of events leading to the Orders of Reference are unclear is that the “consent of the parties” as proclaimed in in the July 26, 2017 Order first appears on the record by way of a July 29, 2016 Notice of Motion and Motion to Refer Action to the Master-in-Equity filed by the Defendants not involved in this Appeal “Austin-HITT Contracting, a Corporation,” “Charleston County Aviation Authority, A Body Politic,” and “Federal Insurance Company/Travelers Casualty and Surety/Liberty Mutual Company” by their attorney R. Patrick Flynn, and consented to by attorney William L. Runyon, Jr. on behalf of his client Plaintiff/Respondent Triad and also consent to by Defendant/Appellant Pelletier by his former counsel Richter Law. (See Notice of Motion on and Motion to Refer Action to the Master-in-Equity of July 29, 2016.) This Motion was granted and entered on August 2, 2016 by way of a

consent order entitled an “Order of Reference.” (See Order of August 2, 2016.) No immediate objections were made to the Orders referencing the case to the Master-in-Equity and neither the July 26, 2016 nor the August 2, 2016 Order (collectively the “Orders of Reference”) was immediately appealed.

Following the Orders of Reference, nothing notable occurred in the case until Pelletier fired Richter Law on December 15, 2016 and then retained their current attorney, William K. Austin. Austin undertook representation of Appellant Blewer filing Blewer’s Answer on January 6, 2017. By way of a consent order dated January 13, 2017, Austin replaced Richter as attorney of record for BRC and Pelletier.

Prior to the filing of Blewer’s Answer, on December 30, 2016, Respondent Triad filed a Notice of Motion to Hold Defendant Jesse L. Blewer in Default stating, “The Plaintiff hereby serves Notice that it will move the Honorable Court of Common Pleas for the Relief sought in the attached Motion Ten (10) Days after service hereof and said Motion . . .” (See Notice of Motion to Hold Jesse L. Blewer in Default, p. 1). Attached to this Notice Motion to Hold Defendant Jesse L. Blewer in Default seeking the designated relief. This Motion was never entertained by the Court. Therefore, Blewer was never held in Default pursuant to an Order of any sort.

Austin’s first court appearance in this case was before the Master on January 9, 2017. At this hearing, the scheduling of mediation was addressed as well Mr. Austin’s contention that it may be necessary to amend the answer and counterclaim of BRC. The Master set a subsequent hearing for February 27, 2017 and informed Mr. Austin that any amended pleading must be prepared by the time of the hearing. For unknown reasons, the scheduling went awry and the Master did not hold the scheduled hearing, but Austin filed the motion to amend the answer and

counterclaims of BRC with the proposed amended pleading attached as instructed. See Transcript, p. 7, line 21.

A hearing on Pelletier's Motion to Amend it's Answer and Counterclaims took place on April 27, 2017, although Austin believed this hearing was not to be limited to the single motion; rather, he believed it was to encompass other matters as well — the Transcript supports Austin's understanding as the Master addressed matters other than just the Motion to Amend. At that hearing, BRC withdrew its motion to join additional parties and withdrew the proposed amended pleading attached to that written motion, and reasserted the motion to amend its answer and counterclaim to and counterclaims and assert cross-claims. (See also Transcript, p. 21 lines 5-15). Judge Scarborough denied BRC motion to "formally amend" it's responsive pleading, but explained that BRC could amend its pleading at any time up to and during trial to conform to evidence. (See Transcript, p. 22 lines 15-18). Further, the Master denied Appellant's request for a jury trial. (See Transcript, p. 4 lines 2-6; See also Transcript, p. 24 lines 13-16). Specifically, Judge Scarborough stated, "I think it's been waived." (Transcript, p. 19, line 6.) The Master's denial of Appellants request for a jury trial is the subject of this Appeal. Appellants' request was made orally before the Master; the Master orally denied it — a written order was not issued. Appellants filed and served their Notice of Appeal on May 19, 2017. Appellants filed and served an Amended Notice of Appeal on May 24, 2017.

ARGUMENTS

I. THE MASTER-IN-EQUITY ERRED IN DENYING APPELLANTS' REQUEST FOR A JURY TRIAL BECAUSE APPELLANTS HAVE A CONSTITUTIONAL RIGHT TO A JURY AS THIS CASE IS AN ACTION IN LAW.

This is an action in law, not in equity. This statement applies to both the Respondent's claims and to Appellant Pelletier's Counterclaims. This is an inviolate Constitutional Right. See S.C. Const. Art. I, § 14. The claims involved were pronounced above in the Statement of Case, and all claim, with a single exception, are unanimously considered actions in law. Therefore, the litigants to this dispute are entitled to a jury trial. This point is fundamental and indisputable. Any argument to the contrary is poppycock.

A. APPELLANT PELLETIER DID NOT WAIVE HIS RIGHT TO A JURY TRIAL DESPITE THE FACT THAT THE ORDER OF REFERENCE WAS ENTERED WITHOUT OBJECTION AND WAS NOT IMMEDIATELY APPEALED BECAUSE HE DID NOT CONSENT TO THE REFERENCE NOR HAD HE REASON TO KNOW ABOUT THE ORDER OF REFERENCE GIVEN THAT HIS FORMER COUNSEL PURJURIOUSLY CONSENTED TO THE ORDER OF REFERENCE AND HID THAT FACT FROM HIM

The available South Carolina case law fails to directly address a situation where the appellant's counsel purjuriously assented to refer the case to the Master-in-Equity thereby relinquishing the appellant's right to a jury trial. However, even in the absence of such direct instruction, controlling precedence provides guidance: In all cases where a litigant was found to have waived their right to a trial by a jury, that appellant slept on their rights, i.e., their failed to promptly object or appeal the referral.

In the case of Appellant Pelletier, the facts are significantly distinguishable in that he never knew of the referral. Rather, his former counsel consented to the reference without even informing Pelletier that another party made such a motion. At the April 27, 2017 hearing, Pelletier's new counsel offered to let his client testify to provide evidence that he did not know of or consent to

relinquish his right to a jury trial, but other than that there is little on the record to support his position on appeal directly. However, there is some evidence and that evidence is sufficient. That evidence is the Answer and Counterclaim of Built Right Construction, LLC and Christopher Pelletier, which Appellant Pelletier did in fact review. In that pleading he demanded a jury trial. When he learned that his former counsel relinquished this right he moved to return this case to the circuit court for a jury trial.

Rule 53(b), SCRCP, which governs the reference of cases to the Master-in-Equity

states:

(b) References. In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court. A case shall not be referred to a master or special referee for the purpose of making a report to the circuit court. The clerk shall promptly provide the master or special referee with a copy of the order of reference.

Rule 53(b), SCRCP. Emphasis Added.

Rule 35, SCRCP, which governs the right of jury trials, states:

(a) Right Preserved. The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser

time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a).

Rule 35, SCRPC. Emphasis Added.

Pelletier properly requested a jury pursuant to Rule 38, SCRPC. This request was not properly waived and must be preserved. For these reasons, this Court should remand the case to the circuit court and grant Appellant Pelletier's request for a jury trial.

Addressing this argument directly to Court of Appeals: I dare not say "with all due respect" as that is simply a euphemism for "without respect," I feel I must state the argument of my client plainly, and I do with absolute respect for each and every Appellant Court Judge that may indeed read this appeal. Pelletier was ripped off by Larry Richter, a disgraced former Circuit Judge well-known for his deceptive and unprofessional conduct, which, as you all likely know, was the direct cause of his de-seating as a circuit court judge and the myriad of disciplinary and pecuniary actions taken against him. Here, Pelletier has taken such actions against his former attorney Richter Law, and these disputes are in the works and unresolved as of the date of this filing. Pelletier has been severely punished for no fault of his own doing: his company lies in ruins and this case has all but destroyed his family. This man, who has suffered discrimination individually as Native American, and as the 100% owner of Native American small business, deserves the same rights all Americans deserve, and in this case, Pelletier deserves a jury trial. He deserves the right not be financially accosted by a corrupt law firm. He, his company, and his family deserve fair payment for government contracted work underlying this case, and demands, to this powerful Court of Appeals, the right to a trial by jury.

B. APPELLANT BLEWER DID NOT WAIVE HIS RIGHT TO A JURY TRIAL BECAUSE HE NEVER HAD THE OPPORTUNITY TO DO SO GIVEN THAT HE FIRST APPEARED BY FILING AN ANSWER MONTHS AFTER THE CASE WAS REFERRED TO THE MASTER-IN-EQUITY, MADE HIS FIRST DEMAND FOR A JURY TRIAL THROUGH HIS ATTORNEY AT THE APRIL 27, 2017 HEARING, THE DENIAL OF WHICH HE IMMEDIATELY APPEALED, AND HE WAS NEVER FOUND TO BE IN DEFAULT.

Appellant Blewer's argument is simple: the Master improperly found that he waived his right to a jury trial given that he was never held in default despite the Respondent's last minute scramble to do so.

Rule 35(d), SCRPC, which governs the right of jury trial waivers, states:

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a).

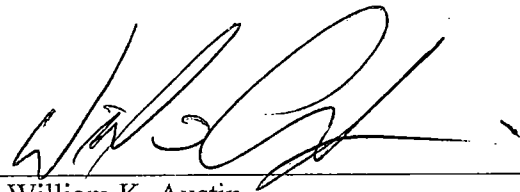
Rule 35(d), SCRPC. Emphasis Added.

Appellant Blewer was never in Default under Rule 55(a). Therefore, he did not waive his right to a jury trial.

CONCLUSION

For the reasons stated above, the court should grant Appellants' appeal by granting them the jury trial they deserve.

Respectfully Submitted,



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of which,

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PROOF OF SERVICE

I certify that I have served a copy of Appellant's Initial Brief and their Designation of Matters to be Included in the Record on Appeal on the attorneys of record for all parties still active in this matter by depositing a copy of the same in the United States Mail with adequate postage affixed in separate envelopes addressed as follows:

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Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. K. Austin', is written over a horizontal line.

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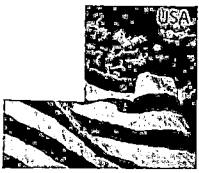
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